SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 361

CLIFFORD L. LIONBERGER,
d.b.a. Lionberger's Auto Parts,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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William T. Stephens and Grant R. Sykes, attorneys for Clifford L. Lionberger, petitioner herein, respectfully request in his behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the judgment of the United States Court of Claims in the above entitled case.

OPINION DELIVERED IN THE COURT BELOW WHICH IS TO BE REVIEWED

The Opinion delivered in the United States Court of Claims is No. 249-59, decided January 20, 1967, and modified by Order dated April 14, 1967. The Opinion is set out *infra* in the appendix hereto. The findings of fact are contained in the Opinion.

JURISDICTION

The Opinion of the Court of Claims was entered on January 20, 1967. Timely motions for Correction of Error in Judgment and for Reconsideration were followed by an Order amending the Judgment dated April 14, 1967. As grounds on which to invoke jurisdiction of this Court, petitioner relies upon Title 28, U.S. Code, Section 1255, and alleges and verily believes that the special and important reasons justifying a grant of review on writ of certiorari (in the sound judicial discretion of this Court within the meaning of Rule 19) is that the court below (1) failed to decide important federal questions presented to it and which should now be decided by this Court; (2) that the decision rendered below contradicts important decisions of the United States Supreme Court; and (3) that the court below neglected to consider the constitutional argument presented by the claimant (petitioner) to such an extent as to call for an exercise of this Court's power of supervision.

QUESTIONS PRESENTED FOR REVIEW

1. Whether tax discrimination, if gross enough, is equivalent to confiscation and thus subject under the Fifth Amendment to challenge and annulment?
2. Whether the tax on the claimant (petitioner) operated with so much injustice as to be grossly discriminatory?

3. Whether the tax as collected by the Director of Internal Revenue under color of Section 3440 of the Internal Revenue Code of 1939 followed from a reasonable administrative interpretation of the statute?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grant Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

Revenue Act of 1932:

> Sec. 618. Definition of Sale
>
> For the purposes of this title, the lease of an article shall be considered the sale of such article. (47 Stat. 169)

Internal Revenue Code of 1939:

> Sec. 3403. Tax on Automobiles, Etc.
>
> There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:
>
> (b) [As amended by Sec. 481(a) of the Revenue Act of 1951, c. 521, 65 Stat. 452] Other Chassis and Bodies, Etc.-Other automobile chassis and bodies, chassis and bodies for trailers and semitrailers (Other

than house trailers) suitable for use in connection with passenger automobiles, and motorcycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 10 per centum, except that on and after April 1, 1954, the rate shall be 7 per centum. A sale of an automobile, trailer, or semitrailer shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

(26 U.S.C. 1952 ed., Sec. 3403)

(e) If tires or inner tubes on which tax has been imposed under this chapter are sold on or in connection with, or with the sale of, a chassis, body, or motorcycle, there shall . . . be credited against the tax under this section an amount equal to, in the case of an article taxable under subsection . . . (b), the applicable percentage rate of tax provided in such subsections -

(1) of the purchase price (less in the case of tires, the part of such price attributable to the metal rim or rim base) if such tires or inner tubes were taxable under Section 3400 (relating to tax on tires and inner tubes); or

(2) if such tires or inner tubes were taxable under Section 3444 (relating to use by manufacturer, producer, or importer) then of the price (less . . . etc.) at which such or similar tires or inner tubes are sold, in the ordinary course of trade, by manufacturers, producers, or importers thereof, as determined by the Commissioner . . .

(55 U.S. Stat. 712, as amended by 65 U.S. Stat. 532)

Section 3440. Definition of Sale. (As originally adopted in 1939)

For the purposes of this title, the lease of an article shall be considered the sale of such article.

Section 3440. Definition of Sale. (As amended by Sec. 553(a) of the Revenue Act of 1941, c. 412, 55 Stat. 687)

For the purposes of this chapter the lease of an article (including any renewal or any extension of a lease or any subsequent lease of such article) by the manufacturer, producer, or importer shall be considered a taxable sale of such article.

(26 U.S.C. 1952 ed., Sec. 3440)

Section 3441. Sale Price

(a) In determining, for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

(b) If an article is–

(1) sold at retail;

(2) sold on consignment; or

(3) sold (otherwise than through an arm's length transaction) at less than the fair market price; the tax under this chapter shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner.

(c) (1) In the case of (A) a lease, (B) a contract for the sale of an article wherein it is provided that the price shall be paid by installments and title to the article sold does not pass until a future date notwithstanding partial payment by installments, (C) a conditional sale, or (D) a chattel mortgage arrange-

ment wherein it is provided that the sales price shall be paid in installments, there shall be paid upon each payment with respect to the article that portion of the total tax which is proportionate to the portion of the total amount to be paid represented by such payment.

(26 U.S.C. 1952 ed., Sec. 3441)

Section 3444. Use By Manufacturer, Producer, or Importer. (As amended by Sec. 553(d) of the Revenue Act of 1941 and Sec. 605 (c)(3) of the Revenue Act of 1950, c. 994, 64 Stat. 906)

(a) If—

(1) any person manufactures, produces, or imports an article (other than a tire, inner tube, or automobile radio or television receiving set taxable under Section 3404) and uses it (otherwise than as a material in the manufacture or production of, or as a component part of, another article to be manufactured or produced by him which will be taxable under this chapter or sold free of tax by virtue of Section 3442, relating to tax-free sales); or

(2) any person manufactures, produces, or imports a tire, inner tube, or automobile radio or television receiving set taxable under Section 3404 and sells it on or in connection with, or with the sale of, an article taxable under Section 3403 (a) or (b), relating to the tax on automobiles, or uses it; he shall be liable for tax under this chapter in the same manner as if such article was sold by him, and the tax (if based on the price for which the article is sold) that is not modified by Section 3441 (b), shall be computed on the price at which such or similar articles are sold, in the ordinary course of trade, by manufacturers, producers, or importers thereof, as determined by the Commissioner.

(26 U.S.C. 1952 ed., Sec. 3444)

STATEMENT OF THE CASE

BACKGROUND

The background of the case is contained in the statement of facts of the opinion (Appendix).

PROCEEDINGS BELOW

Petitioner, plaintiff below, filed a Motion for Summary Judgment together with affidavits and exhibits and the defendant opposed with a Cross Motion for Summary Judgment. The parties filed Answer and Reply Briefs, and oral arguments were heard by the Court. After oral argument, the case was referred to Trial Commissioner C. Murray Bernhardt, with directions to make findings of fact and recommendations for conclusions of law. The parties filed stipulations of fact, prepared recommended findings of fact and proposed conclusions of law and prepared briefs for the Commissioner. The Commissioner filed an opinion and report on March 14, 1966. Exceptions to the Commissioner's opinion and report were filed by plaintiff. The parties filed briefs and the case was again argued orally. The Court adopted the Commissioner's Opinion with minor modifications and entered its opinion on January 20, 1967. The plaintiff filed a Motion for Correction of Error in Judgment and a Motion for Reconsideration with a supporting brief. The Court corrected the judgment in response to the Motion for Correction of Error, but denied plaintiff's Motion for Reconsideration by its Order dated April 14, 1967. Plaintiff thereupon timely entered his Notice of Intent to Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

The Court Below Failed To Decide Important Federal Questions Presented to It, and Which Should Now Be Decided by This Court Because the Decision Rendered Below Contradicts an Important Decision of the United States Supreme Court.

The principal question presented to the Court below was whether the tax on petitioner operated with so much injustice as to be grossly discriminatory, and whether tax discrimination, if gross enough, is equivalent to confiscation and thus subject under the Fifth Amendment to challenge and annulment. The facts show (Op. 20) that petitioner operated a vertically integrated business (a sole proprietorship) which included an easily severable manufacturing enterprise and a trailer rental enterprise. Yet, the Manufacturer's Excise Tax was imposed not upon petitioner's sales revenue from manufacturing (or equivalent), but upon the gross revenue of petitioner's entire integrated business.

The facts further establish that the gross revenue for federal income tax purposes derived by petitioner from his entire business constituted but 47½% of the total trailer rental revenues subjected to the manufacturer's excise tax, and all of which the petitioner had to pay (Op. 23). The facts show that the trailer rental enterprise constituted petitioner's principal business (Op. 18). The facts show that arithmetically, the average gross rentals of each trailer held for rental during its useful life of about ten years would exceed by more than 18 times its taxable market value when new (Op. 19). The facts show that the vast majority of trailer rental operators in the Nationwide System purchased their trailers from others (Op. 20), hence, the manufacturer's excise tax paid on such competitor's trailers was based upon the wholesale market value of the trailers. The facts establish that petitioner's principal business competitor, the U-Haul System,

purchased all of its trailers from its wholly-owned subsidiary manufacturing corporation (Op. 28), and thus, the manufacturer's excise tax on the U-Haul System trailers was based upon the wholesale market value of the trailers.

The Chairman of the House Committee on Ways and Means, 84th Congress, expressed the shock of his Committee at the discriminatory effect of the Manufacturer's Excise Tax as applied by the Internal Revenue Service. He stated: (101 Congressional Record, Part 9, p. 11149)

> "... the manufacturers of utility trailers designed for use with passenger automobiles are discriminated against compared with their competitors who either manufacture or lease such trailers but do not engage in both activities ... The resulting tax often amounts to a larger sum than the value of the trailer when new."

The Court below held that "the tax imposed against Plaintiff's trailer leases amounted to 10% of the rental fee and this, in itself, could not be considered a confiscatory excise."

Petitioner submits that it is not the rate of tax which determines whether a tax is confiscatory, but the discriminatory impact of the tax is the determinant.

For one, in petitioner's competitive situation the excise tax was clearly confiscatory. Petitioner was compelled to discontinue manufacturing his own trailers because of the discriminatory impact of the tax. The tax, as applied, took approximately one-fifth of the gross revenue from rentals of trailers manufactured by petitioner himself. Such a tax could not fail to result otherwise than in the confiscation of all petitioner's profits earned on such trailers. It was an economic impossibility for petitioner to pass on the burden of the tax to his customers to the full extent that the tax was discriminatory. Petitioner competed with numerous other retail rental dealers. His competitors did not have to pass on a tax based on their gross trailer rentals. They had only to pass on the manufacturer's excise tax which was based on the manufacturer's sale price. Petitioner, on the contrary,

had to absorb the bulk of the tax as based on the gross rentals because, in essence, the tax was a retail sales tax. Petitioner could not pass on to his customers a retail sales tax which his competitors did not have to pay.

During the two and one-half year period in issue, the tax collected from petitioner on the average number of 150 rental trailers was approximately 4.82 times the tax which would have been applicable upon the fair market value of the same trailers. During approximately the two year period subsequent to July 1, 1954, petitioner continued to pay the tax on his gross trailer rentals so that the total tax paid by him is approximately 8 times the tax which would have applied on the average trailer if it had been based on the fair market value. Petitioner neglected to make claim for refund of taxes for years subsequent to July 1, 1954. Accordingly, due to the Statute of Limitations, a large percentage of the excess tax paid by petitioner cannot be recovered.

The difference in impact of the manufacturer's excise tax between petitioner and the vast majority of his competitors is (even if confined to the two and one-half year period) a difference of almost 5, clearly a gross difference. Such a gross difference in the impact of tax cannot be categorized as a "mere inequality." Petitioner recognizes that it is not possible to achieve precise equality or uniformity in taxation, since hardships in taxing systems are one of the imperfections of human things. But, there are limits even to human imperfection. The distinguished and eminent Justice Cardozo, speaking of tax inequality, reasoned:

> Discrimination, if gross enough, is equivalent to confiscation and thus subject under the Fifth Amendment to challenge and annulment.[1]

In *Lappin v. District of Columbia*, 22 App. D.C. 69 (1903), cited by petitioner, the tax discrimination between two intended classifications of taxpayers was in a ratio of 2½ to 1. The Court held the act of Congress imposing the discriminatory tax to be unconstitutional. It stated:

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[1] *Stewart Machine Co. v. Davis*, 301 U.S. 548, 585 (1937).

> An unreasonable burden upon the right of a citizen to pursue a lawful occupation open to his competitors upon less onerous terms . . . operates substantially as the taking of property without due process of law.

Petitioner emphasizes that he did not raise *a mere claim* or unreasonable classification or inequality in the incidence of the excise tax. Petitioner pointed out that the grossly discriminatory impact of the tax amounted to confiscation. Petitioner cited *Tower & Sons v. United States*, 135 F. Supp. 874 (Customs Ct.), wherein it held:

> ". . . a mere claim of unreasonable classification or inequality in the incidence or application of the tax or import duty raises no question under the Fifth Amendment . . . there has to be enough of inequality to make it grossly discriminatory and by being grossly discriminatory it becomes akin to confiscation."

Neither the Trial Commissioner nor the Court endeavored to distinguish the facts in petitioner's case to show why the above cited cases would not apply to the facts as found. The above cited cases, and numerous others, were ignored in the Opinion. The Court, misinterpreting petitioner's constitutional argument, relied upon *Neuss, Hesslein & Co. v. Edwards*, 30 F.2d 620, 621 (2d Cir. 1929), *cert. denied*, 279 U.S. 872, wherein Judge Learned Hand observed, the "mere inequality of incidence has never been held enough." Petitioner submits that the Opinion's citation from *Neuss, Hesslein & Co. v. Edwards, supra*, is inapplicable and does not answer the gross discrimination suffered by petitioner because the gross and unreasonable discrimination in petitioner's case is not illustrative of "mere inequality." Judge Hand also recognized that a tax may operate "with so much injustice" as to come within the Fifth Amendment. *Id.* p. 21.

II.

The Tax Collected by the Internal Revenue Service Under Color of Section 3440 of the Internal Revenue Code of 1939, Was Unconstitutional as Arbitrary, Because in Its Effect It Imposed a Graduated Tax on Manufactured Articles Subject to the Tax.

Petitioner does not attack the constitutionality of the Manufacturer's Excise Tax Statute nor any of its Sections. He attacks only the unreasonable manner in which Section 3440 was interpreted and implemented by the Internal Revenue Service so as to result in an unconstitutional result. Petitioner submits that neither the words of the statute, the expressed public policy, nor sound considerations of administrative convenience served to justify the Internal Revenue Service's unreasonable method of applying the statute.

Petitioner submits that Congress endeavored to, and did, design a manufacturer's excise tax which fell fairly and uniformly upon all manufacturers of like articles. Congress also intended an indirect tax which the manufacturer could pass on to the consumer. Congress never intended a tax where the effective rate on articles of one manufacturer subject to tax would be discriminatory in a ratio of up to 18 times the same tax as applied to like articles made by a competitor manufacturer. Congress realized that if the tax were not sensibly designed, some taxpayers would be placed at an unconscionable competitive disadvantage. Congress, therefore, conceived a statute that assured an equitable tax base by levying the tax upon the wholesale market value of the goods subject to the tax. The wholesale market value normally would be the price at which articles were sold by the manufacturer in the ordinary course of trade. Exceptions to the rule to cover sales at retail and sham sales, etc., by manufacturers were provided for in Section 3441 of the Code. Sections 3440 and 3444 were inserted in the Code solely to close loopholes and to prevent evasion of taxes.

Petitioner submits that Congress imposed the excise tax *on* the *articles* manufactured, *not on transactions* by manufacturers. Petitioner emphasizes that only Section 3403 imposes a tax, and it does so on the manufacturer's sale price of articles. Section 3441 defines the sale price. Sections 3440 and 3444 provide that either a lease by, or a use by, the manufacturer shall be considered as a sale. The statute nowhere provides that gross revenues from leases, nor from uses, shall be considered as the sale price. Petitioner concedes that where taxable articles are generally leased by a manufacturer and never sold (as in the case with bus tires, decorative rubber parsley, and certain business machines), the average gross receipts from such leases *by a manufacturer* will closely, if not exactly, approximate, and thus, fairly constitute the sale price. Utility trailers were both sold and leased by petitioner. The market value of his trailers, and of similar trailers made by his competitors was known by the Internal Revenue Service. The vast majority of competing trailer manufacturers sold, but did not lease, utility trailers. The gross revenues from petitioner's utility trailers over a ten year useful life did not remotely approximate the manufacturer's sale price of the trailers. The Internal Revenue Service's reliance on Section 3440 to justify and explain the grossly discriminatory tax collected from petitioner is wholly insupportable either in law or in reason. If justice is to prevail, law must follow from the facts in the case at hand and not from presumptions of the law derived from cases which are distinguishable.

The manufacturer's excise tax was so unreasonably applied by the Internal Revenue Service that the excise on petitioner's trailers amounted to a graduated tax reflecting the volume of lease transactions, rather than the value of the trailer. Total revenues from such lease transactions did not constitute "sales" or income to the taxpayer. In essence, the result was a graduated sales tax on gross trailer rental income.

In a suit involving the interpretation of a state statute imposing a graduated gross sales tax on retail merchants,

this Court held that the tax was unconstitutional as arbitrary, since a tax on the sale of an article constitutes a tax on the article itself.[2]

This Court further held that the alleged fact that the graduated gross sales tax was less complicated and more convenient of administration than an income tax did not justify the use of a graduated gross sales tax which resulted in inequalities of the burden of taxation.[3]

Congress did not intend the discrimination which resulted from the Internal Revenue Service's interpretation of the 1939 Internal Revenue Code, and it acted in 1955 to correct the harm caused by an aggressive interpretation and administration of the statute.

The prerogative of the courts when such situations are encountered has also explicitly been formulated by this Court and others:

> "Literal interpretation of statutes at the expense of the reason of law and producing absurd consequences or flagrant injustice has frequently been condemned." *Sorrels v. United States*, 287 U.S. 435, 446 (1932).
>
> "Where a construction of a statute will occasion great inconvenience or produce inequality or injustice, that view is to be vetoed if another and more reasonable interpretation is present in the statute." *Banker's Trust Co. v. Bowers*, 295 F. 89, 98 (2d Cir. 1923).

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[2] *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 556-557 (1934), *rehearing denied*, 295 U.S. 768 (1935).

[3] *Id.*, p. 559.

III.

The Court Below Neglected To Give Adequate Scrutiny to the Constitutional Argument and the Federal Questions of Law Presented by Petitioner to Such an Extent as To Call for an Exercise of This Court's Power of Supervision.

Petitioner gave the court below numerous and specific reasons to support his Motion for Rehearing and he pointed out unresolved federal questions. Petitioner requested that the court fully consider the constitutional issue presented. Defendant, in response to plaintiff's motion, failed to give a specific reply to the federal questions presented, but merely requested that plaintiff's motion be denied. In consequence, the federal questions raised by petitioner remained unanswered. Defendant's failure to offer a specific response, in substance, constituted a concession. Under the circumstances, the court should have given judgment to the plaintiff, or in the alternative, heard oral arguments on the Motion for a Rehearing.

The court below failed to give adequate consideration to the federal questions of law and equity presented. An example of this neglect is illustrated by the failure of both the Trial Commissioner and the Court to render judgment for the petitioner with respect to the issue respecting multiple taxation of tires and tubes. Defendant conceded this issue to plaintiff in arguments made before the Trial Commissioner, but the Commissioner neglected to recommend judgment for the plaintiff. Plaintiff made exceptions to the Commissioner's Opinion, and in both his Brief and in his Reply Brief to the Court pointed out the Trial Commissioner's oversight. Defendant in his answering brief to the Court again conceded the issue to the plaintiff. Petitioner submits that the failure of the Court then to give judgment to plaintiff on the issue respecting tires and tubes lends strong and tangible evidence in support of petitioner's contention that the Court neglected to give adequate scrutiny to the federal questions posed by plaintiff below.

Another example of the Court's failure to give close scrutiny to the federal questions actually in issue is illustrated by the excessive space in the Court's Opinion which is devoted to refute "agency" arguments which petitioner foresaw as "a diversionary, contentious and largely irrelevant issue." Petitioner, in his Reply Brief before the Commissioner argued that the agency question was diversionary because the cooperating Nationwide rental dealers acted as agents of petitioner in his capacity of a rental dealer, and they were not agents of the petitioner acting in his capacity of manufacturer. Commissioner found as a fact that petitioner conducted an integrated business as a sole proprietor whose manufacturing and rental segments were clearly and easily severable (Opinion, Finding of Fact No. 3). Accordingly, the Trial Commissioner, to be consistent with the facts, should not have found the agency question of any consequence. Petitioner in briefs before the Court requested the Court to recognize the fact that agency was not a question bearing on the federal and constitutional issues actually being presented.

The court below also ignored the fact that petitioner's trailer rentals to ultimate users were of a retail nature. If Section 3440 provides for a tax on multiple leases of trailers, irrespective of the retail nature of the transaction, then clearly the word "sale" as used in Section 3440 would mean something different than it does in other sections of the same chapter, i.e., Sections 3403, 3441 and 3444. An understanding of these other sections is essential to an understanding of Chapter 29 as a whole. Because the court below tended to overlook the relevance of Section 3441(b) and 3441(c), the decision rendered failed to give to Chapter 29 "as great an internal symmetry and consistency as its words permit."[4]

An example of the court's failure to give due scrutiny to the constitutional issue is reflected by the scant reference given to the constitutional question in the Opinion—a single paragraph out of seventeen pages. Yet, the constitutional

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[4] *United States v. Olympic Radio & Television*, 349 U.S. 232, 236.

issue was the controlling issue. Numerous federal cases, including many decisions of the United States Supreme Court, were cited in support of petitioner's arguments before the Commissioner and the Court. These references were ignored in the Opinion. In his Motion for a Rehearing (page 18), petitioner pleaded:

> To date, neither the Commissioner in his Report, nor the Court in its Opinion, has attempted to explain why the law as promulgated in the above cited cases does not apply to remedy the grievous discrimination in plaintiff's factual situation.

CONCLUSION

Petitioner submits that the proper statutory interpretation of Chapter 29 of the Internal Revenue Code of 1939 discloses a tax on the fair market value of plaintiff's trailers, and that respondent's application and interpretation of Section 3440 was arbitrary and unreasonable because it led to gross tax discrimination in contradiction of the general statutory purpose; it was violative of congressional tax policy; and, furthermore, violative of the due process clause of the Fifth Amendment of the Constitution of the United States.

Wherefore, the premises considered, petitioner believes there are special and important reasons justifying a grant of a writ of certiorari in his case.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 249-59

CLIFFORD L. LIONBERGER,
D.B.A. LIONBERGER'S AUTO PARTS

v.

THE UNITED STATES

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

ORDER

This case comes before the court on plaintiff's motion, filed February 14, 1967, for relief from error in judgment pursuant to Rule 69 of the Rules of this court, and plaintiff's motion, filed February 17, 1967, for a rehearing pursuant to Rule 68(b) of the Rules of this court. Upon consideration thereof, together with the response and objection filed by defendant to the respective motions, without oral argument,

IT IS ORDERED this 14th day of April 1967 that plaintiff's motion for relief from error in judgment be and the same is granted as follows: The slip opinion entered herein on January 20, 1967, be and the same is amended in that the period appearing after the word "dismissed" at line 12, page 1, line 34, page 17 and line 4 of the Conclusion of Law at page 29 of the slip opinion be and the same are deleted and the following is added after the word "dismissed" at each of those lines:

except as to plaintiff's claim for entitlement to a credit for excise tax paid on tires and tubes used on trailers which he manufactured and leased, so as to avoid double excise taxation of tires and tubes. Defendant has conceded that plaintiff is entitled to a credit under this latter claim and, therefore, as to it judgment is entered for plaintiff with the case remanded to the commissioner for further proceedings to determine the amount thereof pursuant to Rule 47(c).

IT IS FURTHER ORDERED that plaintiff's motion for a rehearing pursuant to Rule 68(b) of the Rules of this court be and the same is denied.

BY THE COURT

Wilson Cowen
Chief Judge

In the United States Court of Claims

No. 249–59

(Decided January 20, 1967)

CLIFFORD L. LIONBERGER, D.B.A. LIONBERGER'S AUTO PARTS v. THE UNITED STATES

William T. Stephens, attorney of record, for plaintiff. *Grant R. Sykes*, of counsel.

Saylor L. Levitz, with whom was *Assistant Attorney General Mitchell Rogovin*, for defendant. *Lyle M. Turner* and *Philip R. Miller*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

OPINION

PER CURIAM: This case was referred to Trial Commissioner C. Murray Bernhardt, with directions to make findings of fact and recommendation for conclusions of law. The commissioner has done so in an opinion and report filed on April 14, 1966. Exceptions to the commissioner's opinion and report were filed by plaintiff. The parties have filed briefs and the case has been argued orally. Since the court is in agreement with the opinion, findings and recommendation of the trial commissioner, with modifications, it hereby adopts the same, as modified, as the basis for its judgment in this case, as hereinafter set forth. Plaintiff is, therefore, not entitled to recover and the petition is dismissed.

242-724—67——1

Commissioner Bernhardt's opinion,* as modified by the court, is as follows:

This is an action to recover $16,790.02 alleged to have been erroneously collected as manufacturer's excise taxes for the period from January 1, 1951 to June 30, 1954 under § 3440 of the Internal Revenue Code of 1939. Despite strong equities in his favor, the plaintiff is not legally entitled to recover.

The plaintiff is a sole proprietor engaged in the business of selling auto parts and accessories and the manufacture and leasing of automobile utility trailers. The questions presented here are concerned solely with plaintiff's leasing activities in the utility trailer business.

During the period in question taxpayer was a member of Nationwide Trailer Rental System (hereinafter referred to as Nationwide). This organization, a nonprofit, voluntary association of rental operators, incorporated originally under the laws of Michigan has, as its principal function, the administration and regulation of a trailer rental system in behalf of its participants. Viewed from plaintiff's standpoint, the mechanics of the Nationwide trailer leasing system operated as follows:

Following the manufacture of an automobile trailer, plaintiff would make it available for leasing to customers, such leases being either for local use, or what shall be here referred to as a one-way rental. By means of such one-way rentals, a customer could rent a trailer at taxpayer's business situs, use it to transport goods to his point of destination, and there deliver the trailer to another member of the Nationwide organization. The receiving member, designated a rental station or rental operator, would again rent the trailer to a one-way customer who, in his turn, would agree to leave it with a Nationwide rental station at the next destination. In this manner, plantiff's trailers moved from one rental operator to another. The system was reciprocal in that plaintiff also rented trailers belonging to other members of Nationwide.

Uniformity in operation and administrative control was achieved through a system of self-imposed rules implemented by Nationwide itself. A uniform lease agreement was used.

*The opinion, findings of fact, and recommended conclusion of law are submitted under the order of reference and Rule 57(a).

Division of the rental fee was specifically provided for in the association's bylaws. In the case of one-way rentals plaintiff received 52½ percent of the rental, and in the case of local rentals he received 60 percent. Any trailer rented into the system by its owner remained the property of the owner. Hence, with respect to plaintiff's trailers, he held the title, he licensed them, he insured them, he carried the risk of loss, and he authorized major repairs whenever necessary. In short, the members of Nationwide held a common business purpose, but not a common property. Each participating unit remained a distinct business entity whose membership in Nationwide was conditioned upon compliance with the applicable rules and regulations.

In 1952, following an examination of taxpayer's income tax return, the Internal Revenue Service (hereafter IRS) discovered that plaintiff had failed to file manufacturer's excise tax returns. On request, delinquent returns were filed in 1954. In his returns the taxpayer computed his excise tax liability for those trailers which he manufactured and sold, against the sale price, but as to those trailers which he manufactured and leased, he measured his excise tax liability on the basis of the amount received for the first lease of each trailer.

Disagreeing with taxpayer's method of computation respecting the tax due from his leasing operation, IRS took the position that the tax should be based on the gross amount received from each successive lease of a trailer, whether local or one-way. Under this approach, the excise tax would extend not only to every lease, but would also include that portion of each rental fee, whether local or one-way, which the renting agent retained as his "commission". In accordance with its indicated position, IRS assessed a deficiency against plaintiff, who thereafter paid the tax and brought suit here following the denial of his refund claim.

Under the provisions of Chapter 29, subtitle C, of the Internal Revenue Code of 1939, § 3403, 53 Stat. 410, Congress provided for the imposition of a 10 percent excise tax to be levied, among other things, upon the sale by a manufacturer of a trailer suitable for use in connection with passenger automobiles. And by virtue of § 3440 of this Chapter (as

amended by § 553(a), Internal Revenue Act 1941, 55 Stat. 720), the term "sale" was to include "the lease of an article (including any renewal or any extension of a lease or any subsequent lease of such article) by the manufacturer * * *."

These two provisions, i.e., § 3403 which imposes the tax upon a sale and § 3440 which extends the tax to a lease, form the nucleus of the Government's position. In essence, the Government urges a literal application of the statutes. By contrast, taxpayer's fundamental theme is that § 3440 is ambiguous and that the Service's interpretation of this section violates the concept of uniform taxation which Congress had supposedly set up in the manufacturer's excise tax provisions of Chapter 29. Thus, the question at this point is whether taxpayer's trailer rentals constituted "leases" within the meaning of § 3440.

It is, of course, a familiar principle of law that in the construction of a statute the words thereof are to be given their ordinary and familiar meaning. Yet, plaintiff contends that the term "lease" as used in § 3440 was meant by Congress to cover only those leases which one could deem the essential equivalent of a sale. He claims support for this position in the legislative history of the lease provision and in the general taxing scheme set forth in Chapter 29.

Despite the fact that the meaning of § 3440 seems clear and unambiguous on its face, that fact alone would not preclude a review of its legislative history, where such review would aid in ascertaining Congressional intent. For, as the Supreme Court has observed "when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'." *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). However, a review of the legislative history of this section fails to provide conclusive support for taxpayer's assertion.

Section 3440 was originally enacted as § 618 of the Revenue Act of 1932, 47 Stat. 267, and it provided simply that "for the purpose of this title, the lease of an article shall be considered the sale of such article". The only explanation which might conceivably offer some support for plaintiff's argument

appears in S. Rep. No. 665, 72d Cong., 1st Sess., p. 44 (1939–1 Cum. Bull. (Part 2), 496, 528, which states:[2]

> Section 616 [section 618] of the House bill, retained as section 605, provides that the lease of an article shall be considered the sale of an article, so that the tax cannot be evaded by a lease contract which does not involve passage of title.

However, one would be hard-pressed to derive from this language any proof for the argument which plaintiff now makes, namely, that Congress meant to tax only those leases which were the equivalent of sales. And subsequent legislative history is similarly wanting.

Section 618 was incorporated, without change, into the Revenue Code of 1939 as § 3440. A more comprehensive definition of the "lease" provision resulted from the amendment of § 3440 by the Revenue Act of 1941 ch. 412, § 553(a), 55 Stat. 720. As a result of the amendment, the section read as follows:

> SEC. 3440. DEFINITION OF SALE
> For the purposes of this chapter the lease of an article (*including any renewal or any extension of a lease or any subsequent lease of such article*) *by the manufacturer, producer, or importer* shall be considered a taxable sale of such article. (Emphasis indicates words which were added.)

The explanation for this change, which appears in S. Rep. No. 673, Part 1, 77th Cong., 1st Sess., p. 54 (1941–2 Cum. Bull. (Part 2), 466, 507), states only that this amendment was considered a "clarification of existing language" and embraced those "articles subject to manufacturers' sales tax * * * which are generally leased by the manufacturer and not sold."

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[2] Taxpayer also cites S. Rep. No. 398, 68th Cong., 1st Sess., p. 41 (1939–1 Cum. Bull. (Part 2), 266, 294, as legislative authority in support of his position that Congress intended to tax as sales only those leases which were the economic equivalent of sales. This report which refers to Section 604 of the Revenue Act of 1925, imposing a tax upon the sale or lease of jewelry stated:

> Since dealers frequently dispose of goods under a form of contract termed a "lease", which in reality is a contract for a sale with payment by installments, it has been expressly provided that the tax herein levied applies to such transactions.

Though taxpayer's reliance upon this is justifiable, its value here is appreciably diminished not only because it relates to an earlier revenue act dealing with a different subject matter, i.e., jewelry sales, but because the explanation of Section 3440, quoted above, which is controlling here, does not contain any language requiring a lease to be the economic equivalent of a sale before it may be taxed as such.

From this it is readily apparent that the legislative history of § 3440 offers little by way of constructive aid in support of plaintiff's position. It is impossible to glean from it a meaning for the word "lease" which is in any sense different from that which appears in the statute itself. A similar conclusion was reached in the case of *McClintock* v. *Westover*, 167 F. 2d 601 (9th Cir. 1948), where the court observed at 604:

> * * * The Act says "lease" and no limitations are provided. * * * We do not construe § 3440 as meaning that an excise tax accrues whether the article is sold or leased by an instrument which provides that title shall pass when the rent reserved is paid. The appellants mistakenly conclude that since title would never pass under the so-called rental agreement, it was not such a lease as would be within the purview of § 3440.

By way of additional proof on this point the subsequent history of § 3440 becomes instructive. The section, in its amended form, was incorporated into the Internal Revenue Code of 1954 as § 4217. Thereafter, and in response to the very issue now under litigation, Congress, through Public Law 317, ch. 677, 69 Stat. 613, limited the total tax assessable under § 4217. The gist of this amendment, which became effective on September 1, 1955, was to limit the excise tax ordinarily collectible from the leasing of automobile trailers to an amount not to exceed the applicable tax rate multiplied by the fair market value at time of first lease. Equally as significant is the fact that this remedial legislation specifically precluded any retroactive application. That is, the maximum tax which could now be collected, although limited by the fair market value of a trailer, would be computed without credit being given for excise taxes previously paid.

The conclusion which must be drawn from this is that the excise tax laws prior to the 1955 amendment (P.L. 317, *supra*) contemplated no distinction between leases which were the substantial equivalent of sales and those which were not. Congress in response to a discriminatory situation passed legislation to overcome the harsh effects resulting from the literal application of § 3440, but at the same time precluded any retroactive application. The legislative his-

tory is clear that, when that amendatory statute was passed, all interested parties considered the then-existing law to be as defendant now says it was. H. Rep. No. 1290, 84th Cong., 1st Sess., pp. 2–3 (1955–2 Cum. Bull. 847, 847–848); 101 Cong. Rec. 11149. See, also, 2 House Hearings on Excise Tax Technical and Administrative Problems (1956), pp. 57–58 (testimony of Dan T. Smith, Special Assistant to the Secretary of the Treasury); p. 357 (statement of Sigurd Trannal, Tax Manager, Stromberg-Carlson Division of General Dynamics Corporation); pp. 422–423 (statement of Arthur D. Condon, on behalf of the Independent Advisory Committee to the Trucking Industry); pp. 600–601 (statement of Cravath, Swaine & Moore for International Business Machines Corporation); House Hearings on Excise Taxes (1956), pp. 865–877 (testimony and statement of Daniel M. Gribbon, of the law firm of Covington & Burling, representing the International Business Machines Corporation); 103 Cong. Rec. 9841; 104 Cong. Rec. 16850; S. Rep. No. 2090, 85th Cong., 2nd Sess., pp. 26–27 (1958–3 Cum. Bull. 584, 609–610).

As to the narrower question here, whether the trailer rentals were actually leases *per se*, there can be no dispute. The transaction between a renting station and the renting customer gave to the latter the right to hold and to use the hired chattel during the time and for the price stipulated in the contract of hiring, subject only to the condition that due care be exercised during its use. The arrangement is, therefore, within the accepted meaning of a lease—defined in Treasury Regulation 46 (1940 ed., as amended) as—

> * * * a continuous right to the possession or use of a particular article for a period of time. It does not include the use of an article merely as occasion demands, but the contract must give the lessee the right to possess or use the article, without interruption, for a period of time.

Having concluded (a) that the excise tax statute in question, i.e., § 3440, embraced all leases, whether the equivalent of a sale or otherwise, and (b) that plaintiff's trailer rentals were leases within the accepted meaning of that term, it must follow from this that the excise tax statutes, as applied to taxpayer in this case, do fully support the result for which the Government now contends.

Moreover, since the statute itself clearly states that "any renewal or any extension of a lease or any subsequent lease" shall constitute a taxable sale, it clearly supports the view that each trailer rental constituted a separate taxable event. Taxpayer argues that these terms—renewal, extension, subsequent lease—create separate taxable situations only where they run to the same lessee, on the theory that the extension imparts to the transaction the qualities of a true sale, hence making the use of a lease device a sale avoidance mechanism. He contends that, in the more usual situation of numerous leases to different leases, only the first lease, like the first sale, constitutes the single taxable event.

The quite obvious difficulty with the construction is that it totally ignores the phrase "or any subsequent lease", and imparts to the statute a qualification which the statute itself does not contain. As noted, *supra*, Congress in its use of the term "lease" did not limit it to those transactions which were the substantial equivalent of sales, and thus one can perceive no basis for now accepting such a distinction. The statute speaks in terms of a lease, a renewal, an extension or a subsequent lease, each to be treated as a taxable situation.

That the result is harsh and perhaps quite unintended is a fact of which one becomes keenly aware, but the power to supply an omission, or to render a result which the statute precludes, are powers which do not lie within the judicial province. Taxation is at best a most imperfect science, and as observed elsewhere "in taxation it is often true that, not only in the beginning but at the ending, is the Word". *Ungar* v. *Commissioner*, 244 F. 2d 90, 94 (2d Cir. 1957).

Little need be said with respect to the plaintiff's contention that this scheme of taxation, which equates a lease with a sale and subjects both to the same tax rate, amounts to an unconstitutional exercise because of the resulting disparity in the tax burden. None would dispute that a taxing measure may indeed be found unconstitutional, but as Judge Learned Hand observed, the "mere inequality of incidence has never been held enough." *Neuss, Hesslein & Co.* v. *Edwards*, 30 F. 2d 620, 621 (2d Cir. 1929), *cert. denied*, 279 U.S. 872. Unconstitutionality derives neither from unequal imposition nor from unequal incidence, but rather from that special instance where the act is "so arbitrary as to compel

the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. *Magnano Co.* v. *Hamilton*, 292 U.S. 40, 44 (1934).

The excise tax imposed against plaintiff's trailer leases amounted to 10 percent of the rental fee and this, in itself, could not be considered a confiscatory excise. And, further, the equation of a lease to a sale, for purposes of applying the manufacturer's excise tax, must be sustained as a reasonable system of classification in light of the nature of the tax and the taxable incident to which it was meant to apply.

In his skillful attempt to avoid the harsh results of the case, taxpayer invokes the further argument that the leasing of his trailers constituted a "use" of these trailers within the meaning of § 3444 of Chapter 29, and that his tax should have been computed under this section rather than under § 3440.

Section 3444 provides:

> USE BY MANUFACTURER, PRODUCER, OR IMPORTER.
>
> (a) If—
>
> (1) any person manufactures * * * an article * * * and uses it (otherwise than as material in the manufacture or production of, or as a component part of, another article to be manufactured or produced by him which will be taxable under this chapter * * *);
>
> (2) * * * he shall be liable for tax under this chapter in the same manner as if such article was sold by him, and the tax (if based on the price for which the article is sold) shall be computed on the price at which such or similar articles are sold, in the ordinary course of trade, by manufacturers * * * as determined by the Commissioner.

It is plaintiff's contention that the lease of an article for a term roughly corresponding to that article's useful life would be a lease of the type contemplated by § 3440, whereas short-term leases, such as one-way trailer rentals, would constitute a "use", to which § 3444 would apply. This argument is without merit. There is no statutory basis for such

a distinction; the legislative history of § 3440 does not support it, and case law has rejected it. See *McClintock* v. *Westover*, *supra*.

While it is true that every manufacturer uses his product in the sense that it becomes a means of profit for him, the point to be recognized here is that taxpayer's use was obtained through the mechanics of a lease and this form of use Congress has specifically decreed to be taxable as a sale. Thus, the use contemplated by § 3444 is one which does not include a sale, lease, or other means of disposition, but rather one in which both title and beneficial ownership remain with the manufacturer. In the case of a lease, beneficial ownership rests for the term of the lease, in the lessee. It is this diversion in the incidents of ownership which gives rise to a taxable transfer, and precludes taxation under the "use" statute.

Next for consideration is the question as to whether the Internal Revenue Service was correct in computing the excise tax upon the total lease price rather than upon the 52½ percent portion of the rentals which the plaintiff received under the standard rental agreement.

Much of the argument on this issue has been directed towards defining the nature of the legal relationship existing among the members of Nationwide Trailer Rental Service. It is the Government's position that this relationship should be regarded as that of principal and agent, or, alternatively, as a principal-agent-subagent relationship with Nationwide being taxpayer's agent and the rental stations subagents. On the basis of such a characterization, plaintiff's excise tax liability would be measured in terms of the total lease price; that part of each rental fee retained by the renting station would represent a commission and, as such, could not be excluded from the tax base.

However, plaintiff submits that his relationship vis-a-vis Nationwide and its participating members, cannot be classified in terms of agency or subagency. He denies the existence of that degree of control which agency, by definition, reposes in a principal. It is plaintiff's contention that the rental operators are bailees, and that in this capacity, their

rights, duties, and obligations are governed solely by rental instructions issued by Nationwide itself, with each member remaining an independent entity functioning in its own behalf.

The essential criteria determining the existence of an agency relationship, as set forth in the Restatement of the Law of Agency, §§ 12–14, include the following:

> § 12. AGENT AS HOLDER OF A POWER.
> An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself.
>
> § 13. AGENT AS A FIDUCIARY.
> An agent is a fiduciary with respect to matters within the scope of his agency.
>
> § 14. CONTROL BY PRINCIPAL.
> A principal has the right to control the conduct of the agent with respect to matters entrusted to him.

Upon the application of these elements to the facts in this case, one is led to the inescapable conclusion that Nationwide's method of operation was one of mutual agency; hence those who leased plaintiff's trailers to the ultimate users, did so in his behalf and as his agent. The power of the rental operators to contractually bind the plaintiff, their fiduciary obligation to him, and the control which plaintiff maintained over the rental operation permit no other conclusion.

Proceeding to the facts, it should be noted at the outset that the rental station operators held no separate property interest in the trailers which were in their custody; full title remained at all times with the plaintiff, and those who leased in his behalf had no power to deal with the trailers in any manner inconsistent with plaintiff's ownership. Furthermore, the risk of loss remained at all times upon plaintiff, and all major repair work required his specific authorization. And although by no means dispositive of the matter in question, it should be pointed out that the percentage of the rental fee retained by the renting unit was referred to as a "commission". Additional prima-facie evidence derives from the fact that in the uniform leasing agree-

ment used by Nationwide dealers, plaintiff's interest therein was almost invariably referred to as owner and lessor, with the rental station's designation listed as agent. Each lease included a provision permitting the lessor to repossess the trailer in the event the renting customer failed to take adequate care of it. Finally, as to the all important question of control, the evidence reveals that, in the leasing function, the rental operator's managerial discretion was clearly limited by general instructions issued by Nationwide, which instructions were binding upon him by virtue of his membership in that organization.

Pursuant to these instructions a rental operator was prohibited from (a) leasing into the one-way system any trailer not belonging to a Nationwide member, (b) using a Nationwide trailer for local rental purposes, (c) forwarding a trailer to any station save that of another member, and (d) leasing trailers in an order other than that in which received. These instructions also required the rental operator to (a) immediately forward the owner's 52½ percent secured from each rental, (b) secure a deposit in advance for each trailer rental, and (c) perform routine maintenance and do minor repair work for which the owner was to be billed at wholesale. Uniform administrative practices were set up which enabled an owner to know at all times where his equipment was stationed, and a uniform lease agreement was used. The sole area of discretion permitted the rental operator was in the rate which he could charge for a rental. Although Nationwide did publish a suggested rate schedule, adherence to this was not mandatory in light of varying sectional differences as to demand and competition. In all other respects, however, uniformity of operation and control was preserved.

Recognizing the significance of control as the vitally essential element in an agency relationship, plaintiff would seek to avoid such a finding upon the facts in this case by pointing out that it was Nationwide itself, rather than plaintiff, which provided the managerial direction. Thus, argues plaintiff, the members of Nationwide were simply independent cooperating entities, each deriving a profit from a common business.

This argument would have merit if Nationwide functioned as an integrated business, incorporating under one head the trailer businesses conducted by its members. Under such circumstances Nationwide would represent a separate, taxable entity, and each participating member a shareholder. But that is not the case here. The Nationwide Trailer Rental System, though designated a corporation (actually a nonprofit corporation) is in reality nothing more than a voluntary association of individuals having a common business purpose, and as such, the rules of agency would clearly have application. Nationwide, in its corporate state, manifested a business purpose, but was not, in itself, a business. Its bylaws, and the authority which flowed therefrom, were but the joint expression of a joint purpose, and cannot be regarded in any sense different from those agreements which its members could have made by and for themselves. Similar observations were made by the district court (*United States* v. *Nationwide Trailer Rental System, Inc.*, 156 F. Supp. 800, 805 (D. Kan. 1957), *aff'd per curiam*, 355 U.S. 10), which characterized Nationwide in the following terms:

> The defendant NTRS is not an integration of the business of its members. It is not a sole marketing or selling agency through which its members operate. It is rather an organization for the "mutual benefit, comfort, and instruction" of its members.

And in regard to the rental instructions from which plaintiff's control derived, the district court noted the following:

> By virtue of the by-laws, rental instructions issued by the Board of Directors and the Executive Committee *are also agreements between the members.* (Emphasis added.)

Given this fact, it is difficult to see how the control which plaintiff derived through the medium of Nationwide could in any sense be regarded as different from that which he could have asserted personally. The intercession of a bare legal entity, having no distinct tax status, and in all respects subordinate to the will of its members, represents a factor without legal consequence. While it is true that plaintiff's power to control was restricted because changes in the bylaws

were made subject to the membership's majority approval, nevertheless, such a diminution of personal power is not, in itself, contrary to the concept of mutual agency.

Plaintiff's business relationship with the other members of the Nationwide organization meets all the requirements of an agency relation, and must be so regarded. Title, ownership, control, risk of loss—all of these elements remained with the plaintiff, and he must, therefore, be regarded as the actual lessor.

Plaintiff advances several additional arguments, but these would not negate the conclusion which has been reached here. Thus, the circumstance that the rental operators also conducted a regular business, with the leasing business, in most cases, being simply a "sideline", would not destroy, in any way, their incidental function as agents. As to the argument that the rental fee which a leasing station retained represented an amount far exceeding what might realistically be regarded as an agent's commission, thus refuting the existence of an agency, suffice it to say that the agency relationship, being consensual in nature, may allow whatever measure of consideration the parties deem adequate. As previously pointed out, the rental operators held no separate property interest in plaintiff's trailers, and thus the division of the rental price was simply a division, which on the one hand recognized the factor of plaintiff's ownership, and on the other, the services of a renting agent.

Further, the plaintiff argues that his trailers, while in the possession of Nationwide operators, were actually bailed chattels, thereby making those who held them bailees, or, in plaintiff's terminology, "secondary bailors". In this contention plaintiff would appear to be correct.

A bailment relationship is said to arise where an owner, while retaining title, delivers personalty to another for some particular purpose upon an express or implied contract. The relationship includes a return of the goods to the owner or a subsequent disposition in accordance with his instructions. However, one cannot agree with the conclusion which plaintiff would base upon the characterization, namely, that a bailment relationship, on the facts of this case, precludes the finding of an agency relationship as well.

That the two concepts—bailment and agency—are not mutually exclusive concepts, is, of course, well recognized. Indeed, plaintiff does not dispute this. One may be both a bailee and an agent with respect to the personal property of another, so long as the purposes of the bailment are not antagonistic to those of the agency. And the question of whether such a duality of roles is in fact present turns principally upon what has heretofore been described as the right of the bailor and/or principal to direct the performance of his bailee in attaining the purposes of the bailment. Where the one who acts in another's behalf is not at the same time also subject to his control, then the relationship, though otherwise a bailment, is not also an agency. But the extent to which the plaintiff did in fact control the manner of performance, i.e., the leasing function, has already been pointed out, and on the basis of those enumerated elements, it was concluded that the rental operators, while leasing plaintiff's trailers, were at that point his agents. Contrary to the plaintiff's contention, the obligations imposed upon the operators extended well beyond the mere duty to maintain plaintiff's trailers in proper mechanical condition. The limitations to which they were subject by virtue of Nationwide's general instructions comprehended virtually every aspect of the leasing operation; they could hardly be considered "independent" functionaries.

Two final questions remain for consideration. The first of these relates to plaintiff's claimed entitlement to an excise tax credit under the provisions of § 3443. This section provides:

> CREDITS AND REFUNDS.
>
> (a) A credit against tax under this chapter, or a refund, may be allowed or made—
>
> (1) * * *.
>
> (2) to any person who has paid tax under the chapter with respect to an article, when the price on which the tax was based is readjusted by reason of * * * a * * * rebate or allowance; in the amount of that part of the tax proportionate to the part of the price which is refunded or credited.

Plaintiff contends that the contractual division of a trailer rental fee which permitted the renting agent to retain, as his share, 47½ percent of the rental, constituted an allowance or rebate to that operator within the meaning of § 3443, and, therefore, the proper excise tax base should exclude this 47½ percent figure. Support for this interpretation is allegedly derived from the Supreme Court's definition of rebate as "a special allowance to a forwarder as an inducement to ship goods by a particular carrier". *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 353 (1940). By a parity of reasoning, plaintiff concludes that a rebate within the meaning of § 3443 would represent "an allowance of a portion of a rental fee to another firm to rent the taxpayer's trailers."

Whatever merit the analogy might otherwise hold, it cannot overcome the quite obvious fact that the existence of a principal-agent relationship would, by definition, preclude the application of § 3443 to any transfer between the principal and his agent. The plaintiff has neither leased, nor sold, nor rented his trailers to those who lease them in his behalf. Thus there exists no "price" to which a "rebate" or "allowance" could attach. Section 3443 can have meaningful application only in the context where the plaintiff, as owner, could be deemed to have effected a sale or such other form of transfer as would, in itself, be the subject of excise taxation. The simple transfer of possession from plaintiff to rental operator which formed the basis of Nationwide's method of operation was not, and could not, be deemed a taxable transfer under the manufacturer's excise tax provisions. The taxable incident ensued only when the transfer of possession was effected via a lease, that is, a transfer to the ultimate user, and it is strictly to this latter transfer to which § 3443 bears relevance.

By way of final argument, plaintiff contends that the proper excise tax base to be recognized here should, by virtue of § 3441, provide for the exclusion of certain expenses which enter into the computation of the price which a customer pays upon renting a trailer.

Section 3441 reads as follows:

> SEC. 3441. SALE PRICE.
>
> (a) In determining, for the purposes of this chapter, the price for which an article is sold, * * * [a] transportation, delivery, insurance, installation, or other charge * * * shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

The statute, which was the subject of review by the Supreme Court in *Fitch Co.* v. *United States*, 323 U.S. 582 (1945), was there deemed to have, as its purpose, the exclusion from the "sale price", of those charges not related to the cost of manufacturing nor occurring prior to actual shipments, nor otherwise reflected in the f.o.b. price. Thus, as the Court observed, this exclusion would encompass those "additional charges which a purchaser would not be required to pay if he accepted delivery of the article at the factory or place of production * * *." *Ibid*, at 584.

The statute refers to transportation, delivery, insurance, installation and other charges. Moreover, the term "other charges", as construed in *Fitch*, was specifically limited to mean those charges which were essentially similar to the enumerated charges. Yet the charges which plaintiff seeks to exclude, such as "hitching the trailers, connecting tail lights, inspection, minor repair, washing, wheel greasing * * * tire care and replacement" are clearly without the intended scope of those items for which an exclusion would be permitted. Plaintiff's claimed exclusions bear little resemblance to those charges contemplated in the statute. Clearly they were not additional charges but rather part of the lease price itself.

For these reasons there is no basis for sustaining the plaintiff's contentions and his petition must be dismissed.

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FINDINGS OF FACT

1. *The plaintiff and his business.* During the taxable period January 1, 1952–June 30, 1954, plaintiff was doing business as a sole proprietorship under the firm name of Lionberger's Auto Parts, in Columbia, Missouri. The business consisted principally of the manufacture, rental and sale of utility trailers designed for towing behind passenger automobiles. Certain of the rentals were known as one-way rentals, described in finding 9, *infra*. The balance were local rentals, described in finding 18, *infra*.

2. *Trailer rentals as plaintiff's principal business.*

(a) During the two and one-half year period in issue the plaintiff manufactured 297 trailers having a fair market value totaling approximately $61,340, or about $207 each

($61,340 ÷ 297).[1] However, the parties have stipulated the average fair market value of each trailer to be approximately $214, which was also stipulated to be the average selling price of other like trailers manufactured by taxpayer and sold to others.

(b) Of the 297 trailers manufactured by plaintiff during the taxable period, approximately 150 were owned by plaintiff and available for rent to the public instead of being held for sale. There is no dispute in this case as to the trailers manufactured and sold by plaintiff, or as to trailers owned and rented out by plaintiff but not manufactured by him: The gross rentals from the 150 trailers manufactured, owned and rented out by plaintiff during the taxable period totaled $147,914.40, or an arithmetical average of $986 per trailer. Each trailer had an average useful life of ten years. Thus, arithmetically, the average gross rentals from each trailer for its ten-year useful life would be approximately $3,944 ($986 for each of four 2½-year periods), assuming economic conditions to remain unchanged.

The cost, fair market value and rental income from each trailer varied with its size, and the sizes varied from 4′ x 7′ to 5′ x 12′, so the cost, value and income statistics reported here are merely averages for the purpose of the litigation. Again, arithmetically, the average gross rentals of each trailer held for rental during its useful life of about ten years would exceed by approximately 18-plus times its market value when new ($3,944 ÷ $214).

(c) Since the gross rentals for the taxable period exceeded the market value of the total number of trailers manufactured by plaintiff during that period by 2.41 times (61,340 ÷ $147,914), exclusive of additional rentals by plaintiff of trailers not manufactured by him and owned by other Nationwide members (see finding 7, *infra*), it may be concluded that the principal function of plaintiff's integrated business was trailer rental as opposed to manufacture of trailers for sale purposes.[2]

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[1] The stipulation of facts filed by the parties stated the fair market value of each trailer to be $214, but if $61,340 was the fair market value of 297 trailers, which was also stipulated, the value of each trailer would compute at $207. The contradiction in the stipulation is not important to the issues.

[2] The parties have semantic differences with respect to whether the manufacturing and rental aspects of the plaintiff's business were severable. Some competitors were solely manufacturers of trailers and some were solely in the

3. *Severability of trailer manufacturing and renting.*

(a) The manufacture of trailers by plaintiff was a relatively simple operation requiring no special plant facilities or heavy machinery and only a nominal investment. Plaintiff purchased the component parts and assembled them into trailers (and nothing else) at his place of business with the help of employees.

(b) The vast majority of the trailer rental operators who were members of the Nationwide Trailer Rental System, Inc., and who owned trailers which they rented out to users had not manufactured their trailers but had purchased them from others. It may be assumed that plaintiff could have done likewise, instead of using trailers of his own manufacture for rental purposes. The manufacture of one's own trailers was not a prerequisite of being in the trailer rental business. As a business, the manufacture of trailers was easily severable from that of trailer rentals.

4. *Holding for rental as plaintiff's first use of trailers.* The trailers involved in this case were those manufactured by plaintiff and held for rental by him. They were initially stored at plaintiff's several rental locations, from which they were rented by users. Besides having a metal plate attached to the front of each trailer bearing plaintiff's name and address, each trailer was identified by markings as either a one-way trailer in the Nationwide Trailer Rental System, Inc. (hereafter Nationwide; see finding 6), or as a trailer owned by plaintiff and held for local rental purposes. They were licensed in plaintiff's name by the State of Missouri. Plaintiff arranged and paid for advertising relating to the rental of trailers, including advertisements in the classified section of the local telephone book, as Nationwide instructions required. Under his membership agreement with Nationwide, it was necessary for plaintiff to so license, display, advertise, paint and mark his one-way rental trailers. Accordingly, purely as a matter of fact, the first use to which

business of renting trailers. Since the plaintiff did both it might be said that his was an integrated operation, but it is clear from the statistics of his operation that trailer rentals were a substantially greater part of his total business than was the manufacture of trailers, and it may be supposed that plaintiff's books were set up to reflect the receipts and disbursements from each, so to that extent they were separate phases of the plaintiff's integrated business.

the trailers involved in this suit were put after their manufacture was in the rental end of plaintiff's business, and in point of time preceded the use or uses to which the trailers were subsequently put by customers who hired them to haul their personal effects. To the extent the phrase "first use" is a term of art in the application of the excise tax statutes and, hence, a matter of law, this matter is dealt with in the accompanying opinion.

5. *Temporary, sporadic nature of trailer rentals.* Plaintiff, or other members of Nationwide in the case of one-way trailers, rented out trailers for short periods of time to various customers. Certain of the rentals of these trailers were known as one-way rentals as described in findings 9 through 17, and others were known as local rentals as described in findings 18 and 19. Rentals of plaintiff's trailers were made for specific occasions and for specific periods determined by the occasion for the hired use.

6. *Nationwide Trailer Rental System, Inc.* The one-way rentals referred to above were made through plaintiff's membership in an organization known as Nationwide Trailer Rental System, Inc. Nationwide was a nonprofit membership association incorporated in Michigan and provided a trailer rental system for the benefit of its members similar to and including plaintiff who operated trailer rental businesses in various cities throughout the United States. These trailer rental businesses and their locations were known as rental stations and the owners were known as rental operators. Unlike the plaintiff, the vast majority of the rental operators in the Nationwide system who owned trailers had not manufactured those trailers but had purchased them from others. Plaintiff was a member of Nationwide during the taxable period involved in this litigation. Nationwide was a defendant in an antitrust suit brought by the United States. *United States* v. *Nationwide Trailer Rental System*, 156 F. Supp. 800 (D. Kan. 1957), *aff'd per curiam*, 355 U.S. 10.

7. *Operation of Nationwide system.* The Nationwide system operated as follows: As a member of Nationwide having a rental station in Columbia, Missouri, plaintiff made the first rental of each of his newly manufactured trailers to a rental customer who used the trailer to transport his personal property to another city. Each of plaintiff's trailers so

rented would be delivered by the customer to the rental station of another Nationwide member in or near the city to which the customer was destined. In each instance, the second Nationwide member would in turn secure another and different customer who rented plaintiff's trailer for use on a trip to still another city and who delivered plaintiff's trailer to still another Nationwide member. This rental practice continued successively for each one-way trailer owned by plaintiff. This type of trailer rental, i.e., a rental of a trailer on a per-trip basis whereby the trailer is turned in by the renting customer to a different rental station from that where rented, was known in the trailer rental industry as a one-way rental. One-way trailers owned by other Nationwide members also circulated in the system. After the first one-way rental of any specific one-way trailer of plaintiff, it was uncommon for him ever again to obtain physical possession of that particular trailer.

8. *Independent status of Nationwide members.* Station operators who were members of Nationwide owned and operated their independent businesses, hired and discharged their personnel, purchased their own equipment and supplies used in operating the station, and set their own working hours. Except as provided in the Nationwide rental instructions, the display of trailers on the member's lot was determined by him. At any given time, a rental station would have trailers owned by numerous Nationwide members available for rental.

9. *Plaintiff's one-way trailer rentals.* The majority of the trailers manufactured by plaintiff and involved in this suit were rented from city to city throughout the United States in a succession of one-way rentals. These trailers were separately identifiable and rented exclusively on a one-way, per-trip basis. Except in the unusual instance where one of plaintiff's one-way trailers was returned to him, he made only the first one-way rental of these newly manufactured trailers at his place of business in Columbia, Missouri, and subsequent one-way rentals were made by other Nationwide members. Each of the one-way rentals of plaintiff's one-way trailers was for a short period of time based upon the distance of the customer's trip and seldom exceeded two weeks. The

average one-way gross rental fee (amount paid by the rental customer) for plaintiff's trailers was approximately $25.

10. *Owner's responsibility for insurance, repairs, loss.* Each member of Nationwide, including plaintiff, was required by Nationwide rules to carry liability insurance on the trailers which he owned. The owner was liable under the rules to pay for any repairs made to his trailers while in the hands of a rental operator. In the case of major repairs, it was necessary to get the trailer owner's authorization. The wholesale cost of tires and tubes supplied by a rental operator for a trailer was to be charged to the owner. The trailer owner bore the loss if his trailer was stolen or damaged while in the hands of a rental operator or a customer.

11. *Rental procedures; distribution of rents.* Upon renting a trailer, the rental operator filled out a standard lease form provided by Nationwide and collected the rental charge and a deposit from the customer. One copy of the lease was immediately sent to the trailer owner along with 52½ percent of the rental charge; another copy was forwarded to the receiving station (i.e., place of destination) along with the customer's deposit for return to the customer when the trailer was delivered to destination; a third copy was retained by the rental operator, and the fourth was given to the customer. The Nationwide rental instructions to members contained a rental schedule showing in one column a series of total rentals and opposite each a figure representing 52½ percent of the total rental which was to be forwarded to the trailer owner. The rental station member retained 47½ percent of the rental charge as his share of the charge to the customer under Nationwide rules. Each month the trailer owner forwarded to Nationwide 5 percent of the total rents paid for leases of his trailers, one-half of which was paid on behalf of himself as trailer owner, and one-half of which was paid on behalf of the Nationwide members who had rented the owner's trailers during that month. Thus the net effect of the division of the total rental charge for the rental of each trailer was that the trailer owner and the rental station renting the trailer each received 47½ percent of the gross rental, and the remaining 5 percent was forwarded to Nationwide.

12. *Destination procedures on receipt of trailer.* On arriving at destination at the conclusion of a trip by a trailer, the receiving station checked the condition of the trailer, refunded the deposit to the customer if no equipment was missing or damage done to the trailer, and then sent notice-of-arrival cards to the trailer owner and to Nationwide. The receiving station also collected overtime charges specified by the customer's rental contract, which charges were divided evenly between the receiving station and the trailer owner.

13. *Contents of rental agreement form.* Three basic types of one-way rental contracts were used by members of Nationwide for the rental of one-way trailers during the period in suit. Generally, spaces were provided on the form for the following information: Customer's name, address, car make and license number; trailer number and state license number; destination and planned date of arrival; charges for rent, sales tax and deposit; name and address of trailer owner; name and address of station at destination to which customer was required to deliver the trailer; specification of charge rate for overtime. The rental contract provided the customer's agreement that the owner retained the right to repossess the trailer at any time he is not satisfied the customer is properly using or caring for the trailer. There is no indication in the contracts that an excise tax was included in the rental charge, and no separate provision for the charging of an excise tax. Customers were required to sign a rental contract and agree to the terms specified therein before receiving possession.

14. *Nationwide rate schedule.* Nationwide rental instructions to members contained a rate schedule for one-way rentals based on the distance to be traveled and the size of the trailer. A zone number system indicated the number of days, ranging from 1½ to 15½, estimated for trips of varying distances. The schedule was used as a guide. The suggested rental rates were only approximate and were left to the discretion of the renting operator. The existence of other trailer rental systems (finding 20, *infra*) created competition in the industry, which it may be presumed included price competition.

15. *Instructions to Nationwide members.* Nationwide rental instructions provided rules for the rental of one-

way trailers. Trailers in the one-way system had to be rented out in the order they were received by rental operators. One-way trailers could not be used for local rentals. Trailers could be sent only to stations of other Nationwide members. Only approved trailer hitches could be used. Before renting out a trailer, the rental operator was required to check, clean, grease and adjust the wheel bearings on the trailer, replace old cotter keys, check the tires and tighten wheel nuts, and generally check the condition of the trailer. Upon renting the trailer, the rental operator was required to connect the taillight and stoplight, and to clean, sweep and wash the trailers if necessary. They were prohibited from belonging to competing trailer rental systems and from renting in the Nationwide system trailers belonging to persons who were not Nationwide members.

16. *Expulsion or suspension of Nationwide members.* Nationwide's bylaws provided that a member might be expelled or an order be placed stopping trailers from being sent to his station if, in the opinion of the Nationwide board of directors, such action was necessary to keep the system out of legal entanglements or to preserve the good name and business of the system. The bylaws also provided that a member might be expelled for violating any of the bylaws.

17. *Agency status of rental stations.* In its requested finding 17 the defendant cites parts of the record to demonstrate that certain members and officers of Nationwide commonly referred to or dealt with rental operators as agents for trailer owners in keeping the owners advised of the condition or rental demand for the owners' trailers. The citations fail to constitute in themselves proof of agency, which is a legal status to be construed from surrounding facts rather than by layman characterization, and is dealt with in the accompanying opinion.

18. *Local rentals by plaintiff from his premises.* Other trailers manufactured by plaintiff were rented locally from his place of business in Columbia, Missouri. These trailers were designated as local trailers and were rented exclusively on a local basis. They were not in the Nationwide system. They were rented for short periods of time on a per-day (or portion thereof) basis which seldom exceeded three days and were returned by the customer to plaintiff's place of business.

The average local rental fee of plaintiff's trailers was approximately $10. The rental contract form used by plaintiff for local rental of his trailers bore his name at the top, stated the terms and conditions of the trailer rental to the customer, and had spaces for filling in a description of the trailer, the rental period and rate, the amount of deposit, date of contract, and a signature line on one side for the customer and on the other for "agent", being the person actually making the rental for plaintiff. Customers who rented plaintiff's local use trailers customarily were required to sign a rental contract and agree to the terms specified therein before receiving possession. The evidence on the subject is missing, but it may be presumed that the "agent" signing the local rental contract for plaintiff from his premises would be an employee.

19. *Local rentals through substations.* Still other trailers manufactured by the plaintiff were rented locally by substations in Moberly, Jefferson City and Kirkwood, in Missouri, and Ottumwa in Iowa, in the following manner: A number of plaintiff's trailers were located at each substation. The substation rented these trailers to customers on a local basis, whereby the customer returned the trailer to the substation from which he had rented it. The substations were independent service stations which rented trailers as a side line. The substations at Moberly, Kirkwood and Ottumwa retained 40 percent of the rentals received from customers and forwarded 60 percent to the plaintiff. The rentals at Jefferson City were divided equally. No written contracts were executed between plaintiff and the substations. The substations used rental contract forms provided by plaintiff in renting trailers to customers. They were the same forms used by plaintiff for local rentals at his place of business in Columbia. When the rental forms not having the plaintiff's name printed at the top were used by the substations, in some instances the plaintiff's name was stamped on the forms and in others the name of the particular substation was stamped on the form. The rental price was set by the substations since they were more familiar with the market in their locality. There was no definite term to the agreement between the plaintiff and the substations. Either party could terminate the agreement without cause. Plaintiff, rather than

the substation, bore the loss if the trailers rented from the substation were destroyed or damaged through the fault of neither the plaintiff nor the substation while in the possession of a customer. Plaintiff carried liability insurance on trailers located at substations. In the event that damage was caused by one of the plaintiff's trailers while in the hands of a customer, plaintiff's liability insurance carrier generally paid the claim where the damage was caused by either a defective trailer or possible negligence on the part of plaintiff or the substation. The substations remitted plaintiff's percentage of the rentals monthly. Plaintiff was responsible for major repairs, new tires and tubes and painting of the trailers located at the substations. The substations were responsible for greasing the trailers and minor repairs. Plaintiff kept a record of which trailers were located at any particular substation. Plaintiff arranged for and paid for advertising specifically relating to plaintiff's trailers located at the substations. Certain of the substations were also members of Nationwide and rented trailers belonging to members of Nationwide, including plaintiff, on one-way trips. Plaintiff received no portion of the one-way rentals made by the substation unless the particular trailer rented was owned by him, in which case he received the usual 52½ percent of the rental. The substations did not handle trailers owned by others than plaintiff for local rentals. Plaintiff instructed the substations on the proper way to hook up trailers and made suggestions as to the proper maintenance of the equipment. Plaintiff exercised no other control over the substations.

20. *Trailer rental competition; effect on rates.*

(a) Many trailer rental businesses (local, and local and one-way) other than plaintiff's and those affiliated with Nationwide were in active operation throughout the United States during the taxable period. At least five one-way organizations, including U-Haul Rental System and others, were in active operation throughout the United States throughout the taxable period. Trailers rented in these systems competed with those trailers rented in the Nationwide system, including the one-way trailers of plaintiff. Plaintiff's trailers (both local and one-way) competed during the taxable period against numerous other trailers. Competi-

tive forces thus were of prime significance in setting rental charges. The rental fees charged for the rental of plaintiff's trailers (both local and one-way) were not based directly upon the original fair market value of the trailers at the time of manufacture.

(b) U-Haul, a principal business competitor of plaintiff, purchased all of its trailers from its wholly owned subsidiary manufacturing corporations, which did not rent trailers.

21. *Computation and filing of excise tax returns.* On or about August 5, 1954, plaintiff filed delinquent manufacturers' excise tax returns for the first two quarters of 1954. On or about May 25, 1955, plaintiff filed manufacturers' excise tax returns for the period January 1951 through December 1953. The returns pertained only to trailers manufactured by plaintiff. With respect to the trailers which he had sold, plaintiff computed the excise tax due on the basis of the sale price received for the trailers. As to those trailers which had been rented, either locally or for one-way trips, plaintiff computed the excise tax on the basis of the rent received for the first rental of each trailer. On this basis, plaintiff paid to the Internal Revenue Service a total of $1,274.31.

22. *Deficiency assessment.* The returns were audited and an additional deficiency of manufacturers' excise tax in the amount of $12,767.43, interest in the amount of $1,452.89, and penalties in the sum of $2,569.70 (constituting a total additional assessment of $16,790.02) were assessed against plaintiff for the taxable period.

23. *Basis of deficiency assessment.* The foregoing deficiency was assessed on the basis that plaintiff was liable for manufacturers' excise tax on the total rent paid by customers for all rentals during the taxable period of trailers owned by plaintiff which were manufactured by him, including portions of the rent collected and retained by others who rented plaintiff's one-way trailers in one-way rentals and portions of the rent collected and retained by substations which rented plaintiff's local trailers in local rentals.

24. *Credits against excise tax.* The Internal Revenue Service allowed a credit from the tax base for manufacturers' excise tax previously paid by plaintiff to suppliers on tires and tubes in those instances where plaintiff's trailers were

sold, but no credit from the tax base was allowed for manufacturers' excise tax previously paid by plaintiff to suppliers on tires and tubes in those instances where plaintiff's trailers were rented.

25. *Denial of plaintiff's excise tax abatement claim.* On or about December 5, 1955, plaintiff filed a claim for abatement of manufacturers' excise tax assessed against him for the taxable period in the sum of approximately $16,790.02, including interest and penalties, with the District Director of Internal Revenue, St. Louis, Missouri. The claim for abatement was filed within the time and in the manner provided by law. On or about June 27, 1956, the Commissioner of Internal Revenue rejected and disallowed plaintiff's claim for abatement. On or about April 23, 1957, the Commissioner of Internal Revenue denied plaintiff's request for reconsideration of the claim.

26. *Payment of deficiency.* Plaintiff paid the additional assessment of $16,790.02 to the Internal Revenue Service on or about June 24, 1957.

27. *Claim for refund.* On or about November 29, 1957, plaintiff filed a claim for refund in the sum of approximately $15,337.13, plus interest. The claim for refund was filed within the time and manner provided by law. On or about June 23, 1958, the Commissioner of Internal Revenue rejected and disallowed plaintiff's claim for refund. This suit was filed on June 4, 1959. The determination of the amount of plaintiff's recovery, if any, and the question of whether plaintiff bore the burden of the excise tax have been reserved for further proceedings.

Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 361

CLIFFORD L. LIONBERGER, d.b.a.
LIONBERGER'S AUTO PARTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Section 3403(b) of the Internal Revenue Code of 1939[1] imposed an excise tax on a manufacturer's "sale[s]" of "chassis and bodies for trailers and semi-trailers * * * suitable for use in connection with passenger automobiles * * *." Section 3440 of the 1939 Code[2] stated, "the lease of an article (including any renewal or any extension of a lease or any subsequent

[1] Now Section 4061(a)(2)(b) of the Internal Revenue Code of 1954.

[2] Until extensively amended in 1958 (see pp. 4–5 *infra*), Section 4217 of the 1954 Code was the same as Section 3440 of the 1939 Code.

273-000—67

lease of such article) * * * shall be considered a taxable sale of such article." Petitioner, doing business as a sole proprietorship, manufactured such trailers and was also in the "U-Haul" business of leasing them to the public (Pet. 21). The question presented here is whether, as the Court of Claims held, the Commissioner of Internal Revenue correctly ruled that Section 3440 taxed each of petitioner's leases of each trailer he manufactured, or whether, as petitioner argues, the due process clause of the Fifth Amendment forbade the application of Section 3440 except to the first lease of each trailer.[3]

During the years in question—1951 through 1954—petitioner filed no excise tax returns. This failure was discovered during an examination of petitioner's income tax returns. Delinquent returns were then filed. In those returns petitioner measured his excise tax liability solely on the basis of the amount received for the first lease of each trailer (Pet. 22).

The Commissioner assessed a deficiency of $16,790.02 based on the position that each successive lease of each trailer was subject to the tax imposed by Section 3403(b). Petitioner paid the assessment and sued for a refund in the Court of Claims. That court sustained the

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[3] Petitioner's leasing activities were pursuant to his participation in the Nationwide Trailer Rental System. He thus could make a "one-way" lease under which the trailer would be returned to another Nationwide member in another locality, and any subsequent lease would be made by that other member. Petitioner does not reassert in this Court (Pet. 16) his arguments, rejected below (Pet. 29–35), that the other Nationwide members were not his agents in making subsequent leases of petitioner's trailers.

Commissioner's position and dismissed the suit[4] (Pet. 22, 26).

The decision of the Court of Claim is correct. Congress in 1958 amended the Internal Revenue Code in a manner which moots the issue for taxable years after 1958. There is no warrant for review in this Court.

1. Petitioner claims to attack "only the unreasonable manner" in which the Internal Revenue Service "interpreted and implemented" Section 3440, and to make no attack upon the statute itself (Pet. 12). But there is absolutely nothing in the statute or the legislative history to indicate that Congress intended anything other than what the statute clearly and unequivocally states—that each lease by a manufacturer of a taxable article, "including * * * any subsequent lease" was to be taxed as a sale. As the Ninth Circuit held in *McClintock* v. *Westover*, 167 F. 2d 601, petitioner is wrong in contending (Pet. 12–13) that Congress intended to tax only leases which were conditional sales in disguise. This statute, as do other tax statutes, necessarily discriminates in the sense of imposing a different total tax liability on one means of using an asset to produce income—here a succession of leases—than on another type of transaction, such as a sale. But the tax rate of 10 per cent of the rental[5] was

[4] There is no merit to petitioner's contention (Pet. 8–11, 15–17) that the Court of Claims failed to consider his constitutional argument. See the opinion of the Commissioner of the Court of Claims, which the Court of Claims adopted, at Pet. 27–28.

[5] See Section 3403(b) of the 1939 Code.

certainly not confiscatory. Congress indeed contemplated that a manufacturer would pass the tax on by adding the tax to the rent or sales price. See Section 2407(b) of the 1939 Code. Petitioner's failure to take this course was the result of two decisions he made: not to pay any tax—which by law precluded his passing it on (see Section 3325 of the 1939 Code)—and to conduct his leasing business through the same business entity as his manufacturing business, rather than using separate corporate entities, as did his competitors.

Certainly there is nothing here to create one of those "rare and special instances," *Magnano Co.* v. *Hamilton*, 292 U.S. 40, 44, where the Fifth Amendment limits the taxing power of Congress.[6]

2. Congress recognized that the interpretation given Section 3440 below was indeed the meaning intended, and agreed that the section in some circumstances worked the inequities of which petitioner complains.[7] Therefore Congress amended the statute to eliminate those inequities. In 1958 Congress changed Section 4217 of the 1954 Code—which was identical to Section 3440—to provide that the total excise tax imposed on leases of an article by a manufacturer should be limited to an amount not exceeding the tax which would have been imposed on a sale made at a fair

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[6] If petitioner intended to claim that that the decision below in some manner "contradicts" Justice Cardozo's opinion in *Steward Machine Co.* v. *Davis*, 301 U.S. 548, upholding the Social Security tax (see Pet. 8–11), he points to nothing in the facts or analysis in *Steward* to support his position.

[7] See the legislative history collected in the opinion of the Court of Claims Commissioner (Pet. 25–26).

market value at the time of the first lease of the article. See Section 117(a) of the Excise Tax Technical Changes Act of 1958, 72 Stat. 1275, 1280. Petitioner's arguments thus could not be made with respect to taxable years after September 2, 1958, the effective date of the 1958 Act. Thus the issue is of no continuing importance.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SUPREME COURT, U. S.

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IN THE

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OCTOBER TERM, 1967

No. 361

CLIFFORD L. LIONBERGER,
d.b.a.
Lionberger's Auto Parts,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

Respondent fails to find judicial authority to offset the relevant decisions of this and other courts that support petitioner's arguments. Nor has respondent the aid of judicial authority to support the three dubious propositions it raises in its answer. Petitioner submits the opposition thus reflects a cause emaciated by a total want of equity.

Petitioner presented three questions for review by this court, to wit:

1. Whether tax discrimination, if gross enough, is equivalent to confiscation and thus subject under the Fifth Amendment to challenge and annulment.

2. Whether the tax on the petitioner operated with so much injustice as to be grossly discriminatory.

3. Whether the tax as collected by the Director of Internal Revenue under color of Section 3440 of the Internal Revenue Code of 1939 followed from a reasonable administrative interpretation of the statute.

Respondent, by avoiding the first two questions, seeks to defend its action in collecting a discriminatory tax solely by reference to the third. Apparently, respondent concedes that the tax on petitioner operated with so much injustice as to be grossly discriminatory and was thus equivalent to confiscation. If so, then the tax as collected is subject to challenge and annulment even if the Internal Revenue Service's action may have followed from a reasonable administrative interpretation of the statute.

Petitioner, nevertheless, finds respondent's propositions in support of its interpretation of the statute so lacking in merit that he elects to make this reply, though under the circumstances it might be deemed unnecessary.

Respondent first proposes that Section 3403(b) of the Internal Revenue Code of 1939 "imposed an excise tax on a manufacturer's 'sale(s)' of trailers," (Oppos. 1). But, careful reference to Section 3403 does not support respondent's first proposition. The opening (and controlling) clause of Section 3403 is the sole clause imposing a tax in the whole of Chapter 29 of the Internal Revenue Code and it is unambiguous:

> *There shall be imposed upon the following articles* sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold: (emphasis added by petitioner.)

Petitioner submits again (see Petition, 13) that Congress imposed the excise tax *on* certain *articles* of manufacture,

not on transactions by manufacturers. The transaction is only the *taxable event* which imposes the tax *on the article.* The tax on articles subject to the tax was to be computed upon the basis of the price for which articles were sold. Chapter 29 (Sections 3441, 3444, Pet. 5, 6) provided that the price for which sold represented the *price* fairly obtainable by manufacturers selling in arm's length transactions in the ordinary course of trade (i.e., the fair market price). Congress explicitly provided so in Sections 3441 and 3444 wherein "sale price" is carefully defined. Section 3441(a) specifies that the manufacturer's sales price is to be determined at the point of shipment f.o.b. Section 3441(b) specifies that where sales are made (1) at retail, (2) on consignment, or (3) because of untypical conditions at less than the fair market price, the tax is to be computed on the price for which such articles are sold in the ordinary course of trade by manufacturers.

Petitioner notes that respondent makes no reference to Section 3441. The reason for such reticence is clear. The very existence of Section 3441 cuts the ground out from under respondent's opening proposition, to the effect that the tax is on sales as such. The second proposition hinges upon the first.

Respondent's second proposition (which was adopted by the court below) is that Section 3440 of the Code "taxed each of petitioner's leases of each trailer he manufactured" (Oppos. 2). Reference to Section 3440, (Pet. 4, 5) even without reference to other sections of Chapter 29, lends no support to the proposition. Section 3440 does not provide for a tax upon 'leases'; it merely provides that "the" lease of an article (by the manufacturer) shall be considered a taxable sale of such article. Obviously, if the lease by a manufacturer of a taxable article is to be considered a sale of the article, Section 3441 should apply to define the manufacturer's 'sale price' of such article. Section 3441(c) specifically applies to leases. Obviously Section 3441(a) and (b) must also apply.

The trial commissioner found:

> . . . purely as a matter of fact, the first use to which the trailers involved in this suit were put after their manufacture was in the retail end of plaintiff's business, and in point of time preceded the use or uses to which the trailers were subsequently put by customers who hired them to haul their personal effects. (Finding of Fact No. 4, Pet. 39, 40.)

Clearly, on the basis of this finding, Section 3441(a) limits the tax to the f.o.b. sale price of the trailer at the time petitioner "shipped" it to one of his rental lots. Petitioner's trailers were marked with his name and that of Nationwide, they were licensed in petitioner's name, and they were stored at his several rental locations and held out for rental (Finding No. 4, Pet. 39). Such constituted a use of the trailers by the manufacturer thereof, and the provisions of Section 3444 ought have applied. However, petitioner submits that whether his trailers were rendered taxable on the basis of a lease/sale (Section 3440) or a use/sale (Section 3444) is of no ultimate consequence because the correct sale price for tax purposes would be the same in either event, *i.e.*, the fair market price.

Even if it is assumed that the lease to the ultimate customer constituted the taxable event, the trial commissioner found that the average rental fees of petitioner's trailers were for small sums ($10 to $25), substantially less than the $214 fair market value of the trailers (Findings No. 9, 18; Pet. 42, 45). Accordingly, Section 3441(b)(3) was applicable to determine the correct sale price for tax purposes. Findings of Fact No. 6, 7, 8 and 9 (Pet. 40, 41) show that the "majority of the trailers manufactured by petitioner and involved in this suit were rented through a succession of consignments to other Nationwide members." Hence, Section 3441(b)(2) was applicable to determine the sale price of the trailers. Finding No. 1 (Pet. 37) indicates that petitioner's trailers were designed for towing behind *passenger* automobiles. Finding No. 2 (Pet. 38) indicates that the

gross rentals on an average trailer over its 10 year useful life would exceed by approximately 18-plus times its sale value when new. Finding No. 4 (Pet. 39) indicates that the trailers were rented by '*users.*' These and other findings of fact clearly show the retail nature of petitioner's trailer rental business and demonstrate conclusively that Section 3441(b)(1), too, was applicable to determine the correct 'sale price' for excise tax purposes.

Respondent's third proposition is that because Congress amended the Internal Revenue Code in 1958, it moots the issue for taxable years after 1958 and thus, "there is no warrant for review in this court" (Oppos. 3). This astounding hypothesis rests on the absurd premise that because an unlawful evil has been finally stopped, the harm previously done is automatically assuaged. Respondent's proposition also ignores the fact that petitioner's claim covers years prior to 1958. Further, even though Congress' subsequent clarification in 1958 of the scope and purpose of the manufacturer's excise tax may prevent future administrative misinterpretation of the same point, Congressional clarification does not resolve the constitutional issues raised by petitioner, nor does it provide relief for the harm done, the very existence of which subsequently induced Congress to clarify the language of the statute.

It would be sheer negligence for appellant's attorneys to fail to point out to this honorable court the total inappropriateness of respondent's third proposition. It is so deficient in merit that if it were adopted by this court (which serves as the fountainhead and ultimate repository of equity in the United States), it would tend to induce this court to deny any remedy to a citizen severely and inexcusably discriminated against because of administrative blunder. Such a ruling would also deny the most fundamental right of all, the right to equal justice under the law. This is unquestionably so where a confiscation of property ensues contrary to statute, contrary to Congressional policy, and in complete disregard of any meaningful interpretation of constitutional due process.

Respondent asserts that Congress clearly intended "that *such* lease by a manufacturer of a taxable article 'including . . . any subsequent lease' was to be taxed as a sale" (Oppos. 3). Here, respondent feigns to rely upon the parenthetical clause in Section 3440. But, in fact reliance is placed upon the substitution of respondent's own words "*each* lease" for the words in the statute, viz., "*the* lease" (note the singular).

Petitioner submits that respondent ought not be so confused by the purpose for the parenthetical clause. In his brief to the court below, respondent (there the defendant) in speaking of the parenthetical clause, adduced that Congress inserted it in 1941 "apparently in response to the fact that many business machines were being leased *rather than sold* and in response to some *possible* confusion respecting the scope of Section 3440 with respect to *these* leases" (Def.'s Brief, September 9, 1966, p. 14, emphasis added by petitioner.)

Petitioner submits that the only possible confusion which could arise with respect to the scope of Section 3440 as originally worded was the extent to which Section 3441(c) (which provided for installment payments against the tax in the case of certain classes of transactions), might limit the collection of the full 'sale price' of leased articles in the event *the first lease* were to terminate before the taxable price could be fully reached by the tax. This theoretical problem might have arisen because only *new* articles were subject to the tax. A subsequent lease might conceivably have been held to be a sale of a *used* article. But, the notion that Congress intended, through the parenthetical clause, to impose an income tax on gross rentals from all leases of taxable articles (throughout the life of the article) is inherently incredible.

Respondent references *McClintock v. Westover*, 167 F.2d 601 (Oppos. 3). In *McClintock*, the taxpayer was engaged in the business of manufacturing and supplying decorative rubber trimmings, resembling parsley, to meat markets. The taxpayer entered into so-called "rental agreements" with its

customers, under which it agreed to replace fifty per cent of the "parsley" every 60 days. In the light of this arrangement, it is reasonable to assume that the useful life of the "parsley" was approximately two or three months. It is noted that the sample "rental agreement," set out in a footnote to the decision, ran for a period of three months. The court's decision that the excise tax was properly imposed on the so-called rental receipts, and that these constituted the sale price, is supportable on those facts. The taxpayer's tenuous claim that *he used* the "parsley" *in his business* was pardonably scoffed at by the court.

The taxpayer in *McClintock* always leased his product for its useful life to a single lessee, and never sold his product. There is no evidence to show that if McClintock had competitors that they operated differently than he did. Clearly, where manufacturers generally lease some articles and never sell them (as for example, some business machines, bus tires, rubber parsley), competitive inequalities do *not* exist to a degree sufficient to warrant the administrative duty imposed by Sections 3441 and 3444 of determining a tax base on new articles where no sales at the market price were made. Petitioner both rented and sold trailers *of his own manufacture.* (Finding of Fact No. 1, Pet. 37). The fair market price was easily determinable and has been stipulated (Finding No. 2a, Pet. 37). Petitioner's trailer rental business was easily severable from that of trailer manufacture (Finding No. 3b, Pet. 39). Petitioner's rentals were for short periods of time to numerous different customers (Finding No. 5, Pet. 40). Competition was intense (Finding No. 20, Pet. 46). None of the conditions that supported the *McClintock* decision pertain to petitioner. *McClintock* is an entirely different factual situation.

Respondent correctly points out that Congress intended a manufacturer to pass the tax on by adding the tax to the sale price. Respondent asserts that petitioner failed to pass on the tax because of two decisions he made; (1) not to

pay any tax, and (2) not to use separate corporate entities for his manufacturing and rental enterprises (Oppos. 4). Finding No. 3 (Pet. 39) indicates that the manufacture of trailers by petitioner was a relatively simple operation requiring no special plant facilities or heavy machinery and only a nominal investment. In essence, all petitioner did was assemble a wooden, tarp-covered box and afix it between two wheels mounted on an axle. Petitioner purchased all the component parts and assembled trailers in his garage. Petitioner never attempted to avoid paying the manufacturer's excise tax; he just never thought of himself as a manufacturer. When the tax was assessed, petioner paid it. Whether or not petitioner consciously attempted to pass on the tax in the 'sale price' is immaterial. An excise tax based upon the market price cannot fail to be passed-on in the price of taxable articles when competitive conditions exist in an industry. This is because such articles necessarily are priced by the market, regardless of whether a profit is made by any particular manufacturer. This is axiomatic. It is equally impossible for a taxpayer to pass on a discriminatory tax to the full extent that the tax is discriminatory. In the science of economics, it is axiomatic that all else being equal one engaged in a competitive business must either price his product competitively or else he must witness an ebbing away of his sales as his customers are drawn to his competitor's more cheaply priced product.

It is also axiomatic that if one prices his product competitively, (as a responsible businessman must), then all else being equal, his profits will be those generally prevalent in his type of business. However, if all things are not equal because one business carries a higher tax burden than its competitors, then the profit realized by the business bearing the greater burden will be relatively less (to the full extent of the greater burden of the tax) than it would have been had the tax burden been equal. Clearly, petitioner could not have passed on the tax to the full extent that it exceeded the tax properly payable on the 'sale price' of his trailers.

In his affidavit of November 26, 1963 (Pltf.'s Reply Brief to Deft.'s Cross Motion for Summary Judgment, April 29, 1964, Appendix B, Ct. Claims), petitioner stated:

> That many of said trailer rental businesses competitive to my business did not manufacture automobile utility trailers and in fact on several occasions said businesses purchased automobile utility trailers from my business which did manufacture them.

Petitioner's competitors who purchased trailers from him had only to pass on the tax on the one-time sale price. But, when petitioner 'sold' one of his trailers to himself, he had to try to pass on, not an excise tax on the market price of the trailer, but an income tax on the gross life time rental fees of the trailer, approximately half of which rental fees did not even constitute business income to petitioner. While an excise tax can be fully passed on to another, an income tax cannot. Any attempt to pass on an income tax generates additional income in turn subject to the tax.

Respondent affirms that petitioner could have escaped the unending excise tax on 'leases' if he had used distinct corporate entities for his separable manufacturing and leasing business (Oppos., 4). Petitioner is astounded that respondent suggests this fact as a justification for gross tax discrimination. Congress provided in the statute that a manufacturer must pay a tax to be determined at the time of sale (including the lease-sale and use-sale) of certain articles of manufacture. Nowhere did Congress imply in the statute that a retail merchant who might choose to produce articles incidental to his rental business (or any other taxpayer) *must first set up a separate manufacturing corporation* in order to escape having the manufacturer's excise tax fall upon the gross income from his retail business, and in addition, to enable him to avoid the payment of a manufacturer's excise tax upon a part of the gross income of yet other retail businessmen. The Mad Hatter never perplexed Alice with so amazing a legalism.

Respondent's citation of *Magnano Co. v. Hamilton*, 292 U.S. 40 (Oppos. 4) is also irrelevant. Petitioner does not challenge the act of Congress (Pet. 12). Finally, respondent's reference to the 1958 amendments to the excise tax statute (Oppos. 4, 5) is thoroughly irrelevant. Even if the amendments were significant, an amendment to a law is not persuasive of the intent of a prior Congress many years before; and it does not even support a presumption of that Congress' intent. At most, it is the later Congress' interpretation of existing law and the application thereof. In *United States v. Ryder*, 110 U.S. 729, this court stated: "It will not be inferred that the legislature in revising and consolidating the laws intends to change their policy unless such intention be clearly expressed."

In this regard the late Justice Frankfurter offered wise and respected counsel:

> "We do not delve into the minds of legislators or their draftsmen, or committee members, because. . . in many instances where a problem of meaning arises . . . the enactment was not directed toward the troubling question."[1]

The issue before this court concerns the taxpayer's right to substantive equality in tax treatment. To yield to respondent's dangerous propositions is only to encourage laxity in the exercise of administrative duties. Laws will be administered as laxly as the law permits, and this is an issue of continuing importance.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[1] Frankfurter, Felix, "Some Reflections on the Reading of Statutes," *2 Record 213*, Association of the Bar of the City of New York.

CERTIORARI DENIED